Nos. 17A911, 17-8151

IN THE
Supreme Court of the United States

RUSSELL BUCKLEW,

Petitioner,

v.

ANNE PRECYTHE, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the
U.S. Court of Appeals for the Eighth Circuit

Application for a Stay of Execution

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND IN OPPOSITION TO APPLICATION FOR STAY OF EXECUTION

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QUESTIONS PRESENTED

1. As the Eighth Circuit found, the district court granted Russell Bucklew "extensive discovery." Bucklew attempted to seek additional discovery about the qualifications of medical personnel. Did the district court properly exercise its considerable discretion when it refused to permit him to discover the qualifications of medical personnel because Bucklew expressly pleaded that the qualifications had no bearing on whether lethal injection would be unconstitutional?

2. No person submitted quantifiable evidence concerning the duration of execution by lethal gas. The only possibly relevant testimony was one expert's vague, unquantified response that execution by lethal gas would occur "quickly." Did the Eighth Circuit correctly hold that Bucklew failed to provide sufficient evidence for the Court to determine whether lethal gas would "significantly reduce a substantial risk of severe pain" compared to lethal injection given this dearth of evidence?

3. *Glossip* holds that "identify[ing] a known and available alternative method of execution that entails a lesser risk of pain [is] a requirement of *all* Eighth Amendment method-of-execution claims." In 2015, the Eighth Circuit held that Bucklew had to plead a readily available alternative method of execution when raising an as-applied challenge to a method of execution. Bucklew chose not to file a petition for certiorari even though this Court gave him a two-and-a-half-month extension to file. Should this Court carve out an exception to *Glossip* for as-applied –challenges when Bucklew delayed bringing that claim for three years?

STATEMENT OF EXHIBITS

Resp.Ex.1: part 1 of Dr. Zivot's deposition and exhibits.

Resp.Ex.2: part 2 of Dr. Zivot's deposition and exhibits.

Resp.Ex.3: part 3 of Dr. Zivot's deposition and exhibits.

Resp.Ex.4: article relied on by Dr. Zivot.

Resp.Ex.5: Dr. Antognini's deposition.

Resp.Ex.6: memorandum in support of summary judgment.

Resp.Ex.7: reply in support of summary judgment.

Resp.Ex.8: order granting summary judgment.

Resp.Ex.9: order denying Rule 59(e) motion.

Resp.Ex.10: panel decision in *Bucklew v. Precythe*, 17-3052.

Resp.Ex.11: 2008 submission by Bucklew to the Eighth Circuit for funding to pursue an as-applied Eighth Amendment challenge

Resp.Ex.12: Bucklew's Fourth Amended Complaint.

Resp.Ex.13: affidavit from Defendants stating that Defendants will not place Bucklew fully supine.

Resp.Ex.14: Bucklew's reply brief.

Resp.Ex.15: order granting Bucklew an extension of time to petition for cert.

Resp.Ex.16: article describing anesthesia EEG metrics.

Resp.Ex.17: 9-1 order denying stay application

Resp.Ex.18: Bucklew's opening brief

Resp.Ex.19: deposition of Matthew Briesacher

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INTRODUCTION

Russell Bucklew has had more opportunity to avail himself of the courts than most people ever receive. In 2008, after an expert witness evaluated his medical condition, Bucklew declared in a petition to the Eighth Circuit that he believed all forms of lethal injection were unconstitutional as applied to him. Since then, he has unsuccessfully sought relief from his capital sentence in three separate lawsuits. Yet he chose not to file this suit—his as-applied challenge—for six years and waited until just 12 days before his initially scheduled execution to do so. Before this Court decided *Glossip v. Gross*, it granted him a last-minute stay so he could appeal the question whether he was required to plead an available, alternative method of execution. He lost that appeal, declined to petition for certiorari, and expressly refused multiple times to plead an alternative method of execution because, in his words, he "disagree[d] with the Court's ruling that [he] must propose an alternative means of execution." The courts nonetheless afforded him four opportunities to amend his complaint.

Through this prolonged litigation, Bucklew has successfully delayed his execution for a decade, but he is no closer to obtaining success than he was in 2008. As Bucklew presented his claim to the Eighth Circuit, Bucklew must prove a long line of factual predicates to have any hope of succeeding. He asserts that when he lies fully supine, gravity causes his engorged uvula to block his airway, which ordinarily is not problematic because he suggests he can swallow to move it. But he insists that at some point during lethal injection, there will occur what he calls a

"twilight stage": a time when the chemicals have rendered him immobile but have not yet rendered him insensate to pain. He contends that he will be unable to swallow and will therefore feel a choking sensation. He asserts that this time will last so long that it constitutes substantial, unnecessary pain and that execution by lethal gas would be substantially less painful. If he fails to prove any of these assertions, he loses on the merits.

Bucklew cannot prove any of these critical predicates. Although he now changes his factual theory and asserts that he need not lie fully supine to maintain a claim, the claim that he would be forced to lie fully supine was central to his argument before the Eighth Circuit. But as the affidavit Defendants attach establishes, Defendants will not force Bucklew to lie fully supine during his execution. Bucklew also has provided neither evidence for how long the "twilight stage" might last, nor how long it would take for nitrogen-induced hypoxia to operate.

Even if this Court determined that the Eighth Circuit erred and that Bucklew submitted sufficient evidence for every factual predicate, he would still ultimately lose on the merits. Even the dissenting opinion suggested that Bucklew could not win on the merits because he presented his evidence through an expert with obvious personal biases and a demonstrated lack of credibility. Bucklew also faces substantial procedural hurdles on which no court has yet ruled.

None of Bucklew's claims justifies a stay of execution or writ of certiorari. Bucklew will lose this suit in the end, and any further delay will only impede the

victims' and the State's "significant interest in meting out a sentence of death in a timely fashion." *Nelson v. Campbell*, 541 U.S. 637, 644 (2004).

STANDARD OF REVIEW

"[A] stay of execution is an equitable remedy, and an inmate is not entitled to a stay of execution as a matter of course." *Hill v. McDonough*, 547 U.S. 573, 583–84 (2006). "[I]nmates seeking time to challenge the manner in which the State plans to execute them must satisfy *all* of the requirements for a stay, including a showing of a significant possibility of success on the merits." *Id.* at 584 (emphasis added). This Court will not grant a stay "unless the movant, by a clear showing, carries the burden of persuasion." *Id.* (citing *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam)).

This Court has further cautioned that granting a stay impedes "the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Id.* That is because "both the State and crime victims have an important interest in the timely enforcement of a sentence." *Id.* There also is a strong equitable presumption against granting a stay where a party delayed litigation. *Id.* Bucklew cannot meet the demanding burden to obtain a stay.

FACTUAL BACKGROUND

By 1996, Russell Bucklew already had an extensive criminal history, including violence against multiple women. *Bucklew v. Luebbers*, 436 F.3d 1010, 1014 (8th Cir. 2006). When his girlfriend, Stephanie Ray, ended their relationship, Bucklew slashed her face with a knife, beat her, and threatened to kill her. *Id.* at

1013. Terrified, she took her children and fled. *Id.* During the next two weeks, Bucklew stole a car, several firearms, two sets of handcuffs, and duct tape. *Id.* He then covertly stalked Ray until discovering where she was staying. *Id.*

Bucklew burst into that home. With stolen firearms, he shot the homeowner, Michael Sanders, twice, killing him. *Id.* When Sanders' six-year-old son came out of hiding, Bucklew fired at the boy. *Id.* Bucklew pistol-whipped Ray, handcuffed her, dragged her to his car, and raped her. *Id.* at 1013-14. He then engaged in a high-speed chase with police followed by a gunfight where he wounded an officer before succumbing to capture. Bucklew escaped custody and stalked and attacked Ray's mother with a hammer before recapture. *Id.* at 1014. A jury convicted him of numerous crimes and sentenced him to death. *Id.*

I. Bucklew's Medical Condition

Bucklew has long experienced symptoms of hemangioma. Broadly speaking, that disease is common. One variant, for example, occurs in 10 percent of the population. A. Munden, et al., *Prospective Study of Infantile Haemangiomas: Incidence, Clinical Characteristics and Association with Placental Anomalies*, 170(4) Br. J. Dermatol. 907, 907-13 (2014), https://goo.gl/n2hh5R. The disease causes some blood vessels to deform into benign growths, which usually resolve without treatment. *Id.*

Bucklew has a less common variant called "cavernous hemangioma." That variant is characterized by cavities in the growths that can slowly fill with blood. Resp.Ex.1 at 141–42. Some of Bucklew's growths are in his mouth, extend to his uvula, and partly obstruct his airway. They are also sensitive and bleed. They

frequently bleed at night, although he usually sleeps through it without incident. *Id.* at 143. And they bleed when he experiences significant stress. Resp.Ex.12 at 52. The growth in Bucklew's mouth has improved in recent years. Between 2010 and 2016, it shrunk nearly ten percent. Resp.Ex.1 at 172.

Unrelated to his hemangioma, some of Bucklew's "peripheral" veins in his arms are suboptimal because they are smaller, which makes it more difficult (but not impossible) to insert an IV. Resp.Ex.5 77:5-8 (stating that an IV could be placed in Bucklew's right hand). Critically, however, Bucklew never presented any evidence that he has problems with other veins. Bucklew's medical expert neglected to examine the veins in Bucklew's *legs* and never presented any evidence to suggest that those veins are suboptimal. Resp.Ex.1 at 70. Nor did Bucklew present evidence that he has any problems with his much larger "central" veins, which extend from the shoulders (subclavian), to the upper thigh and groin (femoral), and throughout the leg to the ankle (saphenous). Resp.Ex.5 96:1-10. Indeed, the district court found that—with the sole exception of the veins in his *arms*—Bucklew "concedes that there is no evidence in the Record establishing that Plaintiff has any problem with his veins." Resp.Ex.8 at 4. Missouri's lethal injection protocol permits using Bucklew's leg veins and central veins. Pet.App.145a.

It is also undisputed that none of the problems Bucklew has with his arm veins have prevented him from receiving an IV and anesthesia in the past. In recent years, Bucklew has undergone general anesthesia through an IV at least eight times. Resp.Ex.1 at 212. Bucklew asserts in his motion that he will be forced to

undergo a "cut-down" procedure to access his veins. Pet. 10–11. But he has submitted no evidence to suggest he ever had to undergo that procedure before.

His own expert, moreover, testified that medical personnel—if they had to access a central vein—would be able to do so with ease. Dr. Zivot stated that accessing peripheral veins is easier and therefore preferred. But the success rate for accessing central veins without a cut-down procedure is extraordinarily high. Even when Dr. Zivot was an inexperienced anesthesiologist, he could successfully insert an IV into a central vein 90 percent of the time on a single attempt. Resp.Ex.1 at 73. He also stated that anesthesiologists can make at least ten attempts to access a central vein, *id.* at 74, rendering the need for a cut-down statistically impossible. At that rate, the probability of success after two attempts is 99 percent. And the probability of failure after 10 attempts is 1 in 10,000,000,000. Dr. Zivot testified, moreover, that his 90 percent success rate was lower than the rate of more experienced anesthesiologists. *Id.* at 73. Dr. Zivot's testimony comports with the testimony of the State's expert witness—Dr. Antognini—that cut-down procedures are generally reserved for victims of physical trauma in emergency rooms. Resp.Ex.5 at 93–94.

II. The Execution Protocol

The State protocol for lethal injection requires medical personnel to divide five grams of pentobarbital into two syringes. Pet.App. 145–46. That dose is "ten times the amount that would be needed" to render a person unconscious. Resp.Ex.5 at 244–45. The medical personnel then insert an IV into either a peripheral or central vein. Pet.App. 145–46. Once the IV is set, personnel adjust the gurney on

which the inmate is seated "so that medical personnel can observe the prisoner's face." *Id.* Medical personnel then inject the pentobarbital dose, which is more than enough to successfully induce death. *Id.*

Although Missouri law permits use of lethal gas, the State has no protocol in place for lethal gas because that method has not been used since 1965. The State's only gas chamber not only is inoperable; it sits in a museum. Resp.Ex.19 at 49–50. Nothing in the record suggests it could readily become operational.

The State has also been unable to develop a protocol for administering execution by nitrogen because of a lack of evidence and research concerning the procedure. Unlike lethal injection, lethal gas places witnesses and medical personnel at risk in the event of leaks. *Id.* at 58. And the research on nitrogen use is incomplete because no state has ever executed anyone with nitrogen. *Id.* at 56. The Department of Corrections recently looked into the feasibility of writing a protocol for nitrogen gas, but "the research available was not sufficient." *Id.*

Bucklew's expert witness agreed with this uncertainty. He testified that "there's no way to tell if nitrogen gas would not be cruel." Resp.Ex.1 at 39. In fact, some studies of hypoxia induced by other gases suggest that hypoxia entails significant suffering. According to some studies, a person executed by hypoxia remains conscious "for several minutes"—all the while experiencing pain similar to a heart attack, causing the offender to "begin to drool, urinate, defecate, or vomit." *Gray v. Lucas*, 463 U.S. 1237, 1241 (1983) (Marshall, J., dissenting from denial of certiorari) (citing studies). Bucklew never presented evidence about whether

nitrogen would cause such pain. He mentions a study about pilots, Pet. 15, but neglects to mention that the study included nested hearsay and that the district court concluded that the study was not admissible. Resp.Ex.9 at4.

III. Procedural History

Although Bucklew did not file this lawsuit until May 2014, he informed the Eighth Circuit in 2008 that he believed lethal injection was unconstitutional as applied. He retained an expert to review his medical records. That expert opined that his condition interfered with circulation and would prolong any lethal injection, rendering the procedure painful because Bucklew was likely to bleed when subjected to stress. Resp.Ex.11 at 29–30. So Bucklew asked the Eighth Circuit for funds to hire another expert to support a clemency petition. The motion asserted, "Missouri's method of execution, *as applied uniquely to Mr. Bucklew*, may constitute cruel and unusual punishment." *Id.* at 8 (emphasis in original).

A plaintiff who challenges a method of execution must plead that a readily available alternative method exists that carries substantially less risk of unnecessary suffering. This requirement has been in place at least since 2008. *Baze v. Rees*, 553 U.S. 35 (2008), *reaffirmed by Glossip v. Gross*, 135 S. Ct. 2726, 2731 (2015). But in the decade that passed since Bucklew indicated that lethal injection is unconstitutional as applied, Bucklew took every opportunity to delay pleading an alternative method.

First, after unsuccessfully moving to intervene in a suit challenging the lethal injection protocol, *Clemons v. Crawford*, 585 F.3d 1119, 1129 (8th Cir. 2009), Bucklew brought a federal preemption challenge in 2009, seeking relief from

execution. But he chose not to bring his as-applied claim, which sought the same relief. *Ringo v. Lombardi*, 677 F.3d 793, 795–96 (8th Cir. 2012). That suit became moot when Missouri switched chemicals. *Id.*

In 2012, Bucklew raised a facial challenge to the new injection protocol but declined to raise his as-applied claim and declined to plead an alternative method of execution. *In re Lombardi*, 741 F.3d 888, 891 (8th Cir. 2014). The Eighth Circuit rejected Bucklew's complaint because he did not plead an alternative method of execution. *Id.* at 896.

On remand, the district court granted leave to amend. Bucklew declined a third time to plead an alternative method of execution. *Zink v. Lombardi*, 12-04209-CV-C-BP (W.D. Mo. May 2, 2014), Doc.439, at 7-10. The district court declined to dismiss his suit with prejudice and again granted him leave to plead an alternative method of execution. The district court ordered him to re-plead by May 9. *Id.* at 10.

Bucklew declined to do so—for the fourth time—because he "disagree[d] with the Court's ruling that Plaintiffs must propose an alternative means of execution." *Zink*, Doc.443, at 1. The district court dismissed the complaint. That suit involved the same defendants as this suit, and the dismissal constituted a final judgment on the merits. *Id.*

On May 9, the day he was supposed to amend his complaint in *Zink*, he filed this lawsuit—six years after he said he had an as-applied challenge and just 12 days before his scheduled execution. The statute of limitations is five years. Mo. Rev. Stat. § 516.120(4); *Wilson v. Garcia*, 471 U.S. 261, 266-68 (1985).

Bucklew, who was represented by the same counsel in both suits, did not request permission from the district court to split his two theories (facial and as-applied) into two different lawsuits. And he used this new lawsuit as an opportunity to yet again decline to plead an alternative method of execution—his fifth refusal. The district court dismissed the complaint for that reason. *Bucklew v. Lombardi*, 2014 WL 2736014, at *6-7 (W.D. Mo. May 19, 2014).

Bucklew's decision to file his as-applied challenge at the eleventh hour spurred a flurry of last-minute litigation. A divided panel of the Eighth Circuit stayed his execution on the ground that the requirement in *Baze* to plead an alternative method of execution did not encompass as-applied challenges, but the Eighth Circuit immediately vacated the stay en banc. *Bucklew v. Lombardi*, 565 Fed. App'x 562, 571 (8th Cir. 2014), *opinion vacated on reh'g en banc* (May 20, 2014). On the day of Bucklew's scheduled execution, this Court denied Bucklew's petition for certiorari but granted a stay "pending the disposition of petitioner's appeal." *Bucklew v. Lombardi*, 134 S. Ct. 2333 (2014).

Bucklew lost that appeal and chose not to file a petition for certiorari on the very issue he raises in this petition despite this Court granting him a two-and-a-half-month extension. Resp.Ex.15. The Eighth Circuit reaffirmed that *Baze* requires pleading an alternative method of execution in all circumstances. *Bucklew v. Lombardi*, 783 F.3d 1120, 1128 (8th Cir. 2015) (en banc). Three months later, this Court did the same when it held that "identify[ing] a known and available alternative method of execution that entails a lesser risk of pain [is] a requirement

of *all* Eighth Amendment method-of-execution claims." *Glossip*, 135 S. Ct. at 2731 (emphasis added).

The Eighth Circuit then granted Bucklew another chance to amend his complaint. Although Bucklew's argument about *Baze* was wrong, "it was not patently obvious the plaintiff could not prevail," so the Eighth Circuit held that the district court erred in dismissing the complaint *sua sponte*. *Bucklew*, 783 F.3d at 1127. The Eighth Circuit also indicated that Bucklew's suit is likely time-barred because he admitted in 2008 that he had an as-applied claim, but the court declined to rule on that issue because Bucklew was entitled to amend his complaint. *Id.* at 1128–29.

Given another opportunity to plead an alternative method of execution, Bucklew remained steadfast in his refusal—his sixth. Bucklew asserted that he only had to make "allegations concerning [his] medical condition" and that "[i]t is up to the State" to identify alternative methods. *Bucklew*, Doc.30, at 35.

A month later, Bucklew filed his second amended complaint. He again refused to properly plead. This time, he stated that he would not plead an alternative method until the district court ordered substantial medical evaluations. *Bucklew*, Doc.37, at 7. When Defendants moved to dismiss, Bucklew sought leave to amend. The district court granted leave but required that he re-plead within three days in the light of his delay. *Bucklew*, Doc.45, at 1-2.

Bucklew again failed to plead an alternative method of execution—for the eighth time. The district court stated that "[t]here are certainly reasons not to

permit" amendment, notably Bucklew's failure to "plead an alternative despite the Court ordering him to do so." *Bucklew*, Doc.52, at 10-11. The district court nonetheless granted Bucklew "one last opportunity" but made it "extremely clear" that it was the "last time Bucklew will be given the opportunity." *Id.* at 1, 11.

Facing threatened dismissal with prejudice, Bucklew finally—on his ninth attempt—alleged nitrogen-induced hypoxia as an alternative method of execution. Resp.Ex.12. He filed that complaint, his fifth in this suit, on October 13, 2015—seven years after he first announced that he believed all lethal injection protocols were unconstitutional as applied.

IV. Bucklew's Evolving Theories

Bucklew no longer argues the claim specified in his complaint. The operative complaint stated that "*any* means of lethal injection," no matter what chemical is used, "will almost inevitably lead to a prolonged and tortuous execution." Resp.Ex.12 at 2. It further stated that he has difficulty breathing and that the stress of any execution would exacerbate that problem. *Id.* ¶¶ 1, 103, 128, 146. What made lethal injection worse than lethal gas, he asserted, was that "the lethal drug will not circulate as intended, delaying suppression of the central nervous system and prolonging the execution." *Id.* ¶ 6. But Bucklew's medical records conclusively undermined this theory. Even Bucklew's expert conceded that he "ha[d] no evidence" to support that theory. Resp.Ex.1 at 66.

Bucklew then shifted theories and asserted that if he lies "completely prone," Resp.Ex.12 ¶ 128, his uvula will block his throat. But as the panel determined,

Bucklew laid fully supine for more than an hour while undergoing an MRI. Resp.Ex.10 at 9.

When the MRI procedure proved he could lie flat, his claim evolved yet again. Before the Eighth Circuit, he asserted that he can lie fully supine only if he can swallow (to move his uvula). Resp.Ex.18 at 5. He claimed that at some point a "twilight stage" will occur where pentobarbital will render him immobile before suppressing pain sensation. He asserted that he will be unable to swallow during this time and therefore will be able to feel his uvula blocking his throat. Resp.Ex.10 at 9. Bucklew never amended his complaint to assert the existence of a "twilight stage."

In his current petition, Bucklew's claim evolves yet again. Faced with an affidavit that unambiguously states that he will not lie fully supine, he switches his theory and now asserts that his uvula will block his throat even if he is not lying fully supine. Pet. 12.

V. Bucklew Fails to Present Quantifiable Evidence for Either *Glossip* Element

Contrary to Bucklew's present contention, he submitted no evidence to suggest how long the "twilight stage" might last. Relying entirely on an article about pentobarbital administration in horses, Dr. Zivot identified a time interval of 52-240 seconds but expressly stated that this interval referred to how long it would take for Bucklew's brain to stop producing detectable brain waves. Resp.Ex.1 at 85-86. He never identified when pentobarbital would render Bucklew immobile or when it would render him insensate to pain. He stated that the "twilight stage"

would occur sometime "before" Bucklew's brain stopped producing detectable brain waves, *id.* at 81, and he admitted that he had no idea how long that stage might last, *id.* at 84.

Bucklew misconstrues the record when he asserts that Dr. Antognini "thinks Bucklew will experience a sense of suffocation for 20-30 seconds." Pet. 26. In reality, Dr. Antognini testified that the twilight stage would not occur at all. Resp.Ex.5 at 208:5-11. He also testified that, in a lethal injection, Bucklew would cease producing brain waves in as little as 20-30 or as long as 60 seconds. Resp.Ex.5 at 200:10-12.

Neither expert offered any quantifiable testimony about how quickly it would take lethal gas to operate. Dr. Zivot testified that "there's no way to tell if nitrogen gas would not be cruel." Resp.Ex.1 at 39. Bucklew takes unjustified liberties with the record and asserts that Dr. Antognini testified that lethal gas would take 20-30 seconds. Pet. 5. Not so. Dr. Antognini studiously avoided providing a quantifiable estimate because, in part, he had no knowledge of how quickly a gas mask or chamber could be filled with gas and nobody in the United States has ever executed a person with nitrogen. Resp.Ex. 5 at 234:20-21. Dr. Antognini gave only the vague, unquantified response that lethal gas would occur relatively "quickly." Resp.Ex.5 at 232:1-6.

VI. The District Court Decision

The district court granted summary judgment for Defendants. It had no trouble rejecting Bucklew's pleaded claim, holding that "the Record confirms that Plaintiff's condition will not affect the flow of chemicals." Resp.Ex.8 at 4.

The district court also rejected potential arguments about Bucklew's veins. It found that Bucklew never presented legal arguments about his veins. *Id.* at 7. And it noted that Bucklew conceded that no problems existed with his central veins, which Defendants can use to insert the necessary IV. *Id.* at 4. It further determined that arguments about Bucklew's veins would fail—if he had raised them—because the asserted risks were speculative, not quantified. *Id.* at 8.

The district court then considered Bucklew's "twilight stage" theory even though Bucklew never pleaded that the stage exists. It assumed, without deciding, that a triable issue existed about the first *Glossip* element: whether lethal injection would cause substantial, unnecessary suffering. *Id.* at 8–9. It then granted summary judgment in Defendants' favor because Bucklew failed to create a triable dispute for whether nitrogen-induced hypoxia will substantially reduce suffering. *Id.* at 10. It found that Bucklew presented no evidence concerning how long it would take for lethal gas to operate. *Id.* at 11. It also rejected the argument, which Bucklew presents here in his petition, that Bucklew could rely on Dr. Antognini's vague statement about lethal gas. The district court determined that Dr. Antognini's vague, unquantified statement that lethal gas would occur "quickly" did "not support the proposition that nitrogen hypoxia would cause unconsciousness sooner than pentobarbital." *Id.* Bucklew had to establish concrete numbers concerning lethal gas for the court to compare lethal injection to lethal gas; he failed to do so. *Id.*

The district court also granted summary judgment for a second reason. Bucklew's new theory required proving that he had to be fully supine. But even assuming he had to be supine to insert the IV, Bucklew failed to introduce evidence that Defendants could not elevate him after IV insertion. Resp.Ex.9 at 3. The district court did not rule on the procedural issues Defendants presented. Resp.Ex.8 at 1 n.3.

The district court rejected Bucklew's attempt to obtain irrelevant discovery. Despite obtaining "extensive discovery," Resp.Ex.10 at 11, Bucklew tried to discover details about the "development" of the execution protocol; information about procurement, prescriptions, attempts to obtain chemicals, inventory, expiration dates; information about maintenance, storage, and security of chemicals; and not just the qualifications of the medical personnel who will perform the procedure, but also their identities. Pet.App. 47a–52a. The district court denied this request because most of it was irrelevant. Bucklew pleaded that *every* means of lethal injection was unconstitutional, even if he had a world-class medical team and regardless of Defendants' procedures. *Id.* The district court allowed him to discover information about the identity of the chemicals to be used, their expected effect, and the general composition of the medical team and their functions. *Id.* But the district court refused to permit Bucklew to go on a fishing expedition to discover the identities and qualifications of the medical team when he asserted that lethal injection would be unconstitutional even if the medical team was altered. *Id.*

VII. The Panel Decision

A panel of the Eighth Circuit affirmed. Resp.Ex.10. The court focused solely on summary judgment issues and declined to address procedural issues. *Id.* at 3 n.2.

The panel noted that Bucklew admitted in his complaint that Defendants "offer[ed] to adjust the gurney so that Mr. Bucklew is not lying completely prone." *Id.* at 7. Because Defendants stated the same in their answer, the panel determined that the pleadings established that Bucklew will not be fully supine; the gurney will be adjusted so that he is "in a proper position." *Id.* at 7 n.3. Reviewing the record, the panel also noted that Bucklew had been under general anesthesia at least eight times in recent years and had undergone general anesthesia *while* lying supine. *Id.* at 9.

For two independent reasons, the panel affirmed the grant of summary judgment. First, Dr. Antognini never quantified how long it might take to employ lethal gas. He instead stated that both lethal gas and lethal injection would occur relatively "quickly." *Id.* at 12. Because Bucklew failed to submit sufficient evidence comparing the speed of lethal execution to the speed of lethal gas, Bucklew's claim failed. *Id.*

The panel affirmed for a second independent reason. Bucklew's claim depended on establishing that he was sure or very likely to be forced to lie fully supine during lethal injection. *Id.* at 13. But that "argument lack[ed] factual support" because the pleadings established that Defendants agreed not to require Bucklew to lie supine. *Id.* Bucklew's insistence that he would lie supine was unsupported "speculation." *Id.* at 14.

The dissent disagreed on the application of the summary judgment standard but acknowledged that Bucklew would face substantial hurdles if the case ever went to trial. The dissent noted that Bucklew presented his evidence through his expert witness but that the record revealed plenty of reasons to conclude that the witness lacked credibility: Dr. Zivot had repeatedly stated that he categorically opposes lethal injection; his testimony about the "twilight stage" appeared to contradict the article on which he relied; and he has repeatedly issued "inaccurate predictions of calamities at prior executions." *Id.* at 19.

The dissent believed a dispute of fact existed about how long lethal gas would take. Even though Dr. Antognini never quantified an estimate, the dissent stated that it could infer that Dr. Antognini believed lethal gas would take 20–30 seconds. *Id.* at 20. The dissent also stated that a factfinder could determine that Bucklew had to lie fully supine because some previous inmates had and the dissent could not locate evidence that the State "would alter its ordinary procedures." *Id.* at 19.

The Eighth Circuit denied rehearing en banc. Nine judges, including the judge who dissented from the panel opinion, agreed that Bucklew should not receive a stay. Only one judge would have granted a stay. Resp.Ex.17.

SUMMARY OF THE ARGUMENT

Bucklew is not entitled to a stay because he has substantially delayed litigation. In 2008, he told the Eighth Circuit that he believed all forms of lethal injection were unconstitutional as applied in the light of his medical condition. But he waited six years to bring that claim and did so just twelve days before his first

scheduled execution. He also expressly refused to obey the district court's orders to submit a proper complaint solely because, as he stated in one pleading, he "disagree[d] with the Court's ruling." In just this suit, he has submitted *five* complaints. He has also continually shifted his theory, asserting new allegations every time the evidence undermined his old ones. Bucklew also could have asked this Court to review his third question presented three years ago when the Eighth Circuit ruled that he had to plead an alternative method of execution. He instead chose to wait until the eve of his scheduled execution to present that claim.

Bucklew also cannot establish a significant likelihood of success on the merits, so this Court should reject his motion for a stay and petition for certiorari. Bucklew argues that the already "extensive discovery" should have been even more extensive and that the district court abused its considerable discretion when it prohibited Bucklew from discovering information about the qualifications of the medical team for inserting IVs. But that information was irrelevant because Bucklew expressly pleaded that qualifications of the medical team had no bearing on whether lethal injection would be unconstitutional. Bucklew's argument also fails because he centers his discovery argument on the contention that he will suffer when the medical team attempts to secure an IV. But as the district court held, he never preserved that claim. The claim also lacks any merit because he conceded he has no problems with his veins other than his arm veins, and his own expert testified that the medical team could access his central veins at an overwhelmingly high success rate. His expert also neglected to examine the veins in Bucklew's legs.

Bucklew's nondiscovery claim rests on a series of assertions—all of which he must prove. Bucklew's medical condition has caused his uvula to swell. He asserts that when he lies fully supine, gravity causes his uvula to block his airway, which ordinarily is not a problem because he suggests he can swallow to move it. But he asserts that at some point during pentobarbital administration, there will occur what he calls a "twilight stage": a period when pentobarbital will immobilize him—preventing him from swallowing—but where he can still feel pain. He argues that he will experience a choking sensation during this period—if he is forced to lie fully supine—and that this period will last so long that he experiences substantial, unnecessary pain. He asserts that he should instead be executed by nitrogen-induced hypoxia, which he contends will be substantially less painful. Bucklew's claim fails if he cannot prove every assertion.

Bucklew cannot prevail on the merits for numerous reasons. First, he cannot establish that Defendants will force him to lie fully supine. As the panel opinion correctly determined, all parties agree that Defendants are able and willing to adjust the gurney so that Bucklew is not lying fully supine. To the extent the dissenting opinion determined that some ambiguity existed in the record on this issue, Defendants cured that ambiguity by submitting an affidavit affirming that Bucklew will not be forced to lie fully supine. Resp.Ex.13.

Second, Bucklew never presented any evidence to suggest how long the "twilight stage" lasts. Dr. Zivot testified that it might take 52–240 seconds for Bucklew's brain to cease producing detectable brain waves—what some physicians

call "brain death." But he specifically testified that this interval did not concern how long the "twilight stage" would last. He said the twilight stage would occur "before" brain waves ceased and that he had no way of knowing how long the twilight stage might last. But without evidence of the duration of that stage, no court could determine whether Bucklew would experience substantial, unnecessary pain, or whether he would merely have to hold his breath for a second or two, if at all.

Third, Bucklew presented no quantifiable evidence about the time it would take for lethal nitrogen to operate. Bucklew cannot rely on the statement by Dr. Antognini that lethal *injection* would take as little as 20-30 seconds or as long as 60 seconds as quantitative evidence for how long that expert believes lethal gas would take. Defendants' expert said he had no way of knowing how quickly gas would be introduced into a chamber or mask, so he studiously avoided providing quantifiable evidence estimates lethal nitrogen. He offered only the vague, unquantified statement that execution by lethal gas would occur "quickly." Without quantifiable evidence, no court can determine whether lethal gas "significantly reduce[s] a substantial risk of severe pain." *Glossip*, 135 S. Ct. at 2737. In the light of Bucklew's failure to present evidence on critical issues and his failure to preserve arguments, summary judgment was warranted on numerous independent grounds.

Even if this Court remanded for the district court to conduct a bench trial, Bucklew would still be unlikely to prevail. Not only does he lack evidence for crucial issues, but the evidence he presented is weak. Bucklew's arguments rely on evidence submitted by Dr. Zivot. But as even the dissenting opinion in the Eighth

Circuit suggested, Dr. Zivot lacks credibility. He has admitted that he is categorically opposed to lethal injection because that procedure has harmed his career, he is willing to testify that Bucklew faces an unconstitutional procedure regardless of his medical condition, his recent calamitous predictions of suffering in other executions have all proven inaccurate, and his testimony is clearly erroneous. If this case were to proceed to a bench trial, the court would likely rule against Bucklew. This case, moreover, contains numerous procedural issues that no court has yet addressed but that the Eighth Circuit, en banc, has suggested likely defeat Bucklew's suit.

Granting certiorari is also unwarranted because Bucklew has not raised an important question of federal law. His first question presented is unpreserved. His second merely asserts misapplication of the well-known summary judgment standard. And he had the opportunity three years ago to raise his third question when the Eighth Circuit ruled that he had to plead an alternative method of execution. He instead chose to delay until the eve of his execution.

REASONS FOR DENYING THE MOTION AND PETITION

I. Bucklew Could Have Brought This Claim Sooner.

This Court should deny a stay because Bucklew unduly delayed litigation. There exists "a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Hill*, 547 U.S. at 584. Bucklew told the Eighth Circuit in 2008 that lethal injection was unconstitutional as applied to him. But he waited six years before bringing this suit and did so just twelve days before his

initially scheduled execution. And despite having the opportunity to add this claim to his facial challenge, he brought this suit separately without seeking the district court's permission. Even if this Court thinks this case is not time-barred, Bucklew's delay still weighs against granting a stay. Bucklew, moreover, repeatedly declined to plead an alternative method of execution. This suit concerns his *fifth* complaint. Time after time, he filed defective pleadings solely because he "disagree[d] with the Court's ruling," *Zink*, Doc.443, at 1, and he filed a sufficient complaint only after the district court warned him that it would dismiss with prejudice. Resp.Ex.10 at 7.

Bucklew has also continually switched his legal theory. For years, he asserted that his condition would interfere with circulation, prolonging an execution. He switched from that theory when the evidence undermined it. His theory that a "twilight stage" exists appears nowhere in his complaint. He has also abandoned—just now—his assertion that his claim rests on his being forced to lie fully supine.

Bucklew also delayed raising his third question presented. Bucklew asks this Court to consider whether a plaintiff must plead an alternative method of execution in as-applied challenges to execution protocols. But he had an opportunity to raise that issue three years ago and chose not to. The Eighth Circuit expressly held that Bucklew had to plead an alternative method of execution even though his claim is as applied. *Bucklew*, 783 F.3d at 1128. This Court granted him a two-and-a-half-month extension to file a petition for certiorari. Resp.Ex.15. But Bucklew chose instead to wait three years and ask this Court to review that question on the eve of

his execution. Bucklew's decision to refrain from filing a petition for certiorari until now reveals that the petition is nothing more than "a tactic for delay." *Nelson*, 541 U.S. at 648.

II. Bucklew Has Not Established Likelihood of Success on the Merits.

To succeed on the merits, Bucklew will have to prove first that his so-called "twilight stage" exists and will last so long that he is "*sure or very likely*" to experience substantial, unnecessary suffering. *Glossip*, 135 S. Ct. at 2737. He then must prove that nitrogen-induced hypoxia "in fact significantly reduce[s] a substantial risk of severe pain." *Id.* (alteration in original). Bucklew has no likelihood of establishing either element or of establishing likelihood of success on his separate discovery claim.

A. Bucklew's discovery argument is unpreserved and meritless.

Despite the district court's allowing "extensive discovery," Resp.Ex.10 at 11, Bucklew centers his petition on the assertion that he did not receive enough. He seeks additional discovery concerning the qualifications of the medical team, asserting that he needed to probe the qualifications of the medical team to insert an IV. Even the dissenting judge would not have granted this request, and his claim fails for numerous reasons.

First, that argument is not preserved. The district court held that Bucklew failed to raise *any* legal arguments concerning his veins. Resp.Ex.8 at 7. Second, his claim that the medical team will have problems inserting an IV is speculative. Bucklew's expert admitted that he neglected to examine the veins in Bucklew's legs, so Bucklew has submitted no evidence to suggest that those veins are inadequate.

Resp.Ex.1 at 70. Indeed, as the district court found, other than with the veins in his arms, Bucklew "concedes that there is no evidence in the Record establishing that Plaintiff has any problem with his veins." Resp.Ex.8 at 4. At least eight times in recent years, Bucklew has undergone intravenous anesthesia without incident. Resp.Ex.10 at 9. The panel opinion correctly determined that his arguments are speculative. *Id.* at 14–15.

Bucklew's concession also demonstrably refutes his repeated assertion that he will have to experience a "cut-down" procedure. It is undisputed that Bucklew has no problems with his central veins, and Bucklew's own expert testified that it was statistically impossible—given the perfect state of Bucklew's central veins—that the medical team would repeatedly fail to gain access using normal means. He testified that even inexperienced anesthesiologists can access a central vein using normal means 90 percent of the time on any single attempt, which renders the probability that the medical team will fail twice a meager 1 percent. Resp.Ex.1 at 73–74. Bucklew cannot establish that the medical team is "sure or very likely" to have problems with his veins. Any problem would, by definition, be an "isolated mishap" that "while regrettable, does not suggest cruelty." *Baze*, 553 U.S. at 50.

Bucklew's attempt to gain additional discovery fails for yet another critical reason: he pleaded that the qualifications of the medical team had no bearing on whether lethal injection would be unconstitutional. Bucklew never pleaded that any member of the medical team lacked proper qualifications. He instead pleaded that lethal injection was unconstitutional regardless of who was on the medical team.

The district court properly concluded that Bucklew could not go on a fishing expedition without pleading that the qualifications of the medical team were pertinent to his claim. Pet.App.51a. At the very least, that information is not "proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1). It was well within the district court's considerable discretion to deny access to unnecessary information especially when it had already granted Bucklew "extensive discovery," Resp.Ex.10 at 11, including information about the medical team and the effects of pentobarbital on the human body. Pet.App.48a–52a.

B. Bucklew will not lie fully supine, so a critical factual predicate of his claim fails.

As both the panel and the dissent recognized, critical to Bucklew's "twilight stage" theory is the assertion that he will be forced to lie fully supine during a lethal injection. Resp.Ex.10 at 13, 19.

The panel correctly determined that Defendants submitted evidence that they are able and willing to adjust the gurney. As the panel held, it is undisputed based on the pleadings that Defendants have "offer[ed] to adjust the gurney so that Mr. Bucklew is not lying completely prone." *Id.* at 7 & n.3. The dissent disagreed but acknowledged that Defendants are entitled to judgment if evidence exists that the State will not force Bucklew to lie fully supine. *Id.* at 19.

As the panel correctly held, the record contains sufficient evidence to establish that Bucklew will not lie fully supine, but to the extent some jurists could determine that the record includes ambiguity, Defendants submitted an additional affidavit to the Eighth Circuit in response to Bucklew's stay motion. That affidavit

affirms that Bucklew will not be forced to lie fully supine. Resp.Ex.13. And Bucklew never submitted contrary evidence that Defendants would be unable to ensure that he will not lie fully supine. Bucklew's claim—which depends on the assertion that he will lie fully supine—fails.

Bucklew's evolving theories evolve again. Confronted with this affidavit, Bucklew now asserts that lying supine is immaterial to his claim. Pet. 12. This new assertion is a volte-face from what he argued before the Eighth Circuit. Before that Court, he centered his claim on the assertion that he would have to lie fully supine. In his opening brief, he declared, "When Bucklew is in a *fully supine* position, his uvula is pulled, by force of gravity, back into his airway thereby effectively blocking airflow." Resp.Ex.18 at 5 (emphasis added). He stated that he must manage his airway "while in the supine position." *Id.* at 5. His "be[ing] forced to lie supine," he asserted, is what "result[s] in choking, gagging, hemorrhaging, and ultimately suffocation." *Id.* at 45. He pressed that he was entitled to additional discovery because, allegedly, it would "definitively establish that he will have to be supine." *Id.* at 27. He also stated that he uses pillows to sleep at an "incline" to avoid being fully supine, Resp.Ex.18 at 37, but now contradicts his statement by asserting that he sleeps "upright," Pet. 9. As the Eighth Circuit recognized, Bucklew's theory was centered on the assertion that he would have to lie fully supine. Resp.Ex.10 at 13. This Court should not grant a stay of execution or a writ of certiorari on Bucklew's brand-new theory.

C. Bucklew failed to present evidence concerning how long the "twilight stage" might last.

Bucklew attempted to establish the first *Glossip* element by asserting that a period of time exists when pentobarbital will have immobilized him but will not yet have rendered him insensate to pain. He contends that he will experience choking during that period if he is lying fully supine because he will be unable to consciously swallow. Undoubtedly, he created a triable issue for whether this "twilight stage" exists.

But he failed to present any evidence about how long this stage might last. Bucklew argues that when Dr. Zivot identified a time interval of 52-240 seconds, he was referring to the duration of the twilight stage. Pet. 13. But the record refutes that contention. Dr. Zivot referred solely to the duration until Bucklew stopped producing detectable brain waves—what some physicians call "brain death." In his deposition, Dr. Zivot stated that he derived the interval from a single study. Resp.Ex.1 at 85. He further stated that the study "recorded a range of as short as fifty-two seconds and as long as about two hundred and forty seconds before they see *isoelectric EEG*." *Id.* at 86 (emphasis added). An EEG test measures brain waves on a scale of 0 to 100, with 100 referring to patients who are fully awake. Jay w. Johansen, et al., *Development and Clinical Application of Electroencephalographic Bispectrum Monitoring*, 93 Anesthesiology 1336, 1336 (2000). Resp.Ex.16. A score of 0—an "isoelectric EEG"—refers to a patient who emits no detectable brain activity. *Id.* Dr. Zivot expressly stated that it would take 52-240 seconds for Bucklew to

experience an "isoelectric EEG" or "complete cessation" of detectable brain waves. Resp.Ex.1 at 86.

But Dr. Zivot never testified that the twilight stage, if it occurs, would last the same length of time. Just the opposite. It is well-established that a person becomes insensate to pain when they emit an EEG score of between 40 and 65—far before the isoelectric point. Resp.Ex.16 fig.1. Consistent with this medical understanding, Dr. Zivot testified that the twilight stage, if it occurred, would occur "before" the isoelectric point. Dr. Zivot admitted he could not pinpoint when the "decreased brain activity" of the isoelectric point would occur, only that it would occur "at some point" during the 52-240 second interval. Resp.Ex.1 at 81. He then explained that the twilight stage would occur "before then." *Id.* When asked to pinpoint when it might occur, Dr. Zivot admitted he could not and responded that "there's a wide range of time that could be." *Id.* at 84. Dr. Zivot never identified when pentobarbital might immobilize Bucklew, nor when pentobarbital would render him insensate to pain.

The record therefore lacks any evidence for how long the twilight stage would last if it occurred. Yet Bucklew's claim rests on establishing that the stage is so long that it will cause him to experience substantial, unnecessary suffering. Without this evidence, Bucklew cannot establish that lethal injection is "sure or very likely to cause serious illness and needless suffering," creating a "substantial risk of serious harm." *Glossip*, 135 S. Ct. at 2737. If the twilight stage lasts just two or three

seconds, for example, then it is no more intolerable than the universal experience of holding one's breath for several seconds.

Even if Dr. Zivot was referring to the length of the twilight stage, not—as he plainly was—to the entirely different isoelectric point, Bucklew still could not establish a *genuine* dispute of material fact on the length of the twilight stage. Clearly erroneous evidence does not create a triable issue. "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris*, 550 U.S. 372, 380 (2007).

Dr. Zivot's testimony "blatantly contradicted" the article on which he rested his testimony. Dr. Zivot rested his testimony solely on a study about horse euthanasia. Resp.Ex. 1 at 85. That study never mentions anything remotely similar to a "twilight stage." It concerns only the time until the isoelectric point—when the horses ceased producing detectable brain waves. Dr. Zivot testified that the study reported that it takes *between* 52 and 240 seconds for pentobarbital to cause an isoelectric EEG. *Id.* at 86. But the study reports that every subject experienced an isoelectric EEG "*within* 52 seconds." Resp.Ex.4 at 5 (emphasis added). In fact, only one horse lasted that long. The median time was 18 seconds; the quickest, 2 seconds. *Id.* The latter number, 240 seconds, refers not to pentobarbital but—oddly enough—to lethal gas. The article references a finding from a different study that gas-induced hypoxia did not cause an isoelectric EEG for 240 seconds. *Id.* at 8.

Because the sole article on which Dr. Zivot relied blatantly contradicts his assertion that it might take pentobarbital up to 240 seconds to render a person what some call "brain dead," the most one can construe from his testimony is that it might take up to 52 seconds to reach the isoelectric point. *See Scott*, 550 U.S. at 380.

D. The Eighth Circuit correctly determined that the record lacks quantifiable evidence to compare nitrogen-induced hypoxia to lethal injection.

To meet the second *Glossip* element, Bucklew must establish an alternative method of execution that is "feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain." *Glossip*, 135 S. Ct. at 2737 (citation omitted). Both the district court and the panel held that Bucklew failed to establish this element because he never presented evidence for how long execution by nitrogen-induced hypoxia would take. For example, Dr. Zivot testified that "there's no way to tell if nitrogen gas would not be cruel." Resp.Ex.1 at 39.

The panel opinion correctly held that Bucklew needed to present comparative evidence. Resp.Ex.10 at 12. Bucklew rests his argument on the assertion that pentobarbital might take 52-240 seconds for him to cease producing detectable brain waves. That interval is irrelevant to Bucklew's claim for the reasons stated above. But even if it were relevant, without quantifiable evidence about how long nitrogen-induced hypoxia might take, no court could compare the methods. *Id.*

Bucklew takes unjustified liberties with the record when he incorrectly asserts that it is "undisputed that lethal gas would cause him to experience a sense of suffocation for, at most, 20-30 seconds." Pet. 18. To the contrary, no quantifiable evidence about the duration of execution by lethal gas exists in the record.

Bucklew asks this Court to put words into Dr. Antognini's mouth that he never said. Dr. Antognini testified that nitrogen-induced hypoxia could take as little as 20-30 seconds or as long as 60 seconds. Resp.Ex.5 at 200:10-12. He also stated that lethal injection and lethal gas would both render a person unconscious "quickly." Resp.Ex.5 at 232:1-6. Bucklew argues that this Court should extrapolate from that exchange that Dr. Antognini believes nitrogen-induced hypoxia would render a person unconscious within 20-30 seconds and that this Court should compare that alleged evidence to Dr. Zivot's testimony that lethal injection would take 52-240 seconds. But that argument fails for numerous reasons.

First, Dr. Antognini never quantified the duration of execution by lethal gas. He stated only that both lethal injection and lethal gas would occur "quickly." Dr. Antognini did *not* say that lethal gas would occur faster than lethal injection. He left his assertion vague and undefined. This Court cannot extrapolate quantifiable evidence where none exists. Indeed, Dr. Antognini was extremely careful to avoid quantifying a duration for lethal gas. He cautioned that his testimony about lethal gas was not "as well founded as some of [his] other conclusions." Resp.Ex.5 at 236:3-4. In particular, he stated that he could not quantify the duration of nitrogen-induced hypoxia because he had no way of knowing "how quickly the gas is introduced." *Id.* at 234:20-21. In fact, he based his opinion in part on how *cyanide* gas is used because nitrogen-induced hypoxia has never been used for an execution in the United States. *Id.* at 233:5. It would be error to infer from Dr. Antognini's

statement quantified evidence about nitrogen-induced hypoxia when Dr. Antognini studiously avoided presenting quantified evidence.

Second, even if this Court adopted Bucklew's argument that Dr. Zivot thought execution by lethal gas would take the *same* amount of time as execution by lethal injection, Bucklew's argument would still fail. If Dr. Antognini is correct that it would take up to 52 seconds for lethal injection to cause an isoelectric EEG—what some refer to as "brain death"—and Dr. Antognini is correct that execution by lethal gas would take the same amount of time as execution by lethal injection, then Bucklew's own argument would reveal only that lethal gas and lethal injection take the same amount of time.

Third, Bucklew presents a skewed version of the record when he asserts that Dr. Antognini suggested that lethal injection would *always* take 20-30 seconds to render a person unconscious. Dr. Antognini instead testified that lethal injection could take as little as 20-30 seconds but as long as 60 seconds. Resp.Ex.5 at 200:10-12. Dr. Zivot's statement that execution by lethal injection could take as long as 240 seconds is clearly erroneous for the reasons stated above. Dr. Zivot's testimony is thus limited to the assertion that lethal injection would cause Bucklew to cease producing detectable brain waves "within 52 seconds." Resp.Ex.4 at 5. So even if Bucklew is correct that this Court can create quantifiable evidence about the duration of lethal gas when Dr. Antognini never submitted any such evidence, Bucklew's argument still fails. Under Bucklew's argument, Dr. Antognini testified that execution by lethal gas could take *longer* than Dr. Zivot's estimate for lethal

injection. The evidence in the record is insufficient to determine whether Bucklew would be "sure or very likely" to experience a substantially less painful execution by lethal gas. *See Glossip*, 135 S. Ct. at 2737.

E. Bucklew's claim rests on evidence provided by an expert witness who lacks credibility.

If this Court remands for a trial, Defendants will more than likely prevail. The only evidence Bucklew presented for his critical "twilight stage" theory came through his expert witness. But as even the Eighth Circuit panel dissent suggested, Dr. Zivot lacks credibility. Resp.Ex.10 at 19.

In particular, success on the first *Glossip* element requires Bucklew to prove that the "twilight stage" will last between 52 and 240 seconds. For the reasons stated in Part II.C, Dr. Zivot's testimony refers only to the duration until detectable brain waves cease, not how long the "twilight stage" might last. In any event, his testimony lacks credibility because he misrepresents the article on which he relies.

Dr. Zivot also lacks credibility because he admitted that his testimony was not based on Bucklew's medical condition. He instead asserted that he believes "lethal injection by design will be cruel in every circumstance." *E.g.*, Resp.Ex.1 at 105; *accord id.* at 17-18 (stating that "[l]ethal injection was never anything other than a façade for punishment").

Dr. Zivot's categorical assumption that lethal injection would be cruel even absent Bucklew's medical condition conforms to erroneous affidavits he filed in other cases. At least three times, he has opined that an inmate would suffer excruciating pain by lethal injection. *Id.* at 99–101. But he admits that no evidence

exists that *any* of them, all of whom have been executed, experienced such pain. *Id.* In one instance, he testified that an inmate "will suffer an excruciating death" because the inmate was overweight. *Id.* at 42. But Dr. Zivot admits that no evidence suggests the inmate experienced distress. *Id.* at 99–101. Indeed, that inmate sang "Amazing Grace" before quickly becoming unconscious. *Id.* at 46–47.

Dr. Zivot also lacks credibility because he has dramatically changed his position on how quickly pentobarbital renders a person unconscious. He testified here that pentobarbital will cause a person to stop producing detectable brain waves no sooner than 52 seconds and that it might take as long as 240 seconds. But in an article he wrote four years ago, he stated that the first time he witnessed use of chemicals like pentobarbital "was nothing short of astounding" because the chemical, "*in a moment*, rendered the patient unconscious." *Id.* at 256 (emphasis added). In that article, Dr. Zivot also admitted that he categorically opposes lethal injection because the use of lethal injection had interfered with his career. He declared frustration that he trained for "thousands of hours" to obtain certification to use certain chemicals, only for pharmaceutical companies to discontinue manufacturing those chemicals in response to anti-death penalty activists. *Id.*

In short, Dr. Zivot has admitted that he categorically opposes lethal injection because it has interfered with his career, his testimony has been proven inaccurate each time he testified that a person would experience substantial pain from execution, and his testimony about the time interval relies solely on a clearly

erroneous reading of an article. Dr. Zivot's lack of credibility weighs substantially against Bucklew's likelihood of success on the merits.

F. Bucklew Is Likely to Lose on Procedural Grounds.

Even if Bucklew could prevail on the merits, he is substantially likely to lose on the procedural issues. In 2008, Bucklew retained an expert to review his medical records. That expert opined that all lethal injection would be unconstitutional because of Bucklew's condition. Resp.Ex.11 at 2, 29. Bucklew chose not to file suit. Six years later, he retained another medical expert, who opined the same thing. Resp.Ex.12 ¶¶ 15, 77–83. That time, just twelve days before execution, he filed suit. No court has yet ruled on the procedural issues, but the Eighth Circuit, en banc, stated that there exists a substantial likelihood that Bucklew's suit is time-barred by the five-year statute of limitations. *Bucklew*, 783 F.3d at 1129.

Similarly, Bucklew's suit is likely barred by res judicata. "[A] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Allen v. McCurry*, 449 U.S. 94, 94 (1980). Bucklew argued before the panel that his cause of action arose in April 2014. Resp.Ex.14 at 4. Even assuming his contention is true, his lawsuit in *Zink* was ongoing at that time. He could have raised this claim in *Zink*. In fact, he filed this suit on the day he was required to file an amended pleading in *Zink*. But he never asked the district court for permission to split his claims even though he had the same counsel in both actions. His claim is precluded.

III. Reviewing any of the questions presented would be unwarranted.

This Court has already held that "identify[ing] a known and available alternative method of execution that entails a lesser risk of pain [is] a requirement of *all* Eighth Amendment method-of-execution claims." *Glossip*, 135 S. Ct. at 2731 (emphasis added).

Bucklew asks this Court to carve out an exception to the holding in *Glossip* that he plead an alternative method of execution because he raises an as-applied challenge. But Bucklew had an opportunity to raise this issue before this Court three years ago. The Eighth Circuit expressly held that Bucklew had to plead an alternative method of execution even though his claim is as applied. *Bucklew*, 783 F.3d at 1128. But Bucklew chose not to file a petition for certiorari even though this Court granted him a two-and-a-half-month extension. Resp.Ex.15. Bucklew's decision to save that petition for certiorari until now reveals that the petition is "a tactic for delay." *Nelson*, 541 U.S. at 648.

Bucklew has also failed to establish any compelling reason why this Court should adopt his carveout. Bucklew admits that any suffering he experiences will be accidental. Pet. 3. That admission defeats his claim because a challenge under the Eighth Amendment requires a *mens rea*. Bucklew can prevail only if no prison official could claim they were "subjectively blameless." *Glossip*, 135 S. Ct. at 2737. Any harm he might suffer, "while regrettable, does not suggest cruelty." *Baze*, 553 U.S. at 50.

Reviewing the other questions presented is similarly unavailing. Bucklew's discovery argument is not preserved and is also meritless. Bucklew second question

presented asserts that the Eighth Circuit misapplied standards for summary judgment. But "[t]he standard for granting summary judgment is well-known" and needs no correction. *E.g.*, *McMunn v. Babcock & Wilcox Power Generation Grp., Inc.*, 869 F.3d 246, 260 (3d Cir. 2017), *Pinto v. Allstate Ins. Co.*, 221 F.3d 394, 398 (2d Cir. 2000); *S.E.C. v. Murphy*, 626 F.2d 633, 640 (9th Cir. 1980). Bucklew has not identified any circuit split. He has merely asserted that the Eighth Circuit split from other circuits by *misapplying* the well-known standard for summary judgment. This case presents no novel or important legal question about summary judgment.

Not only did the Eighth Circuit correctly apply the summary judgment standard, but even if this Court disagreed, this Court need not exercise its extraordinary power of review to correct what Bucklew purports is a single misapplication of a standard that is correctly employed thousands of times each year. Bucklew admits that he wants this Court to "reaffirm" the well-known summary judgment standard. Pet. 20. But granting certiorari is unwarranted when the petition merely asserts a "misapplication of a properly stated rule of law." Sup. Ct. R. 10. The Court also could not consider Bucklew's second question presented without also considering every other factual predicate Bucklew must establish because without establishing those predicates, he cannot prevail.

Granting certiorari or a stay is further unwarranted where, as here, "the State and the victims of crime have an important interest in the timely enforcement of a sentence"—enforcement that has already been delayed by 22 years and a stay by this Court four years ago. *Hill*, 547 U.S. at 584. And it is especially unwarranted

because, as established above, Bucklew is extremely unlikely to prevail on the merits—as even the panel dissent below suggested.

CONCLUSION

Bucklew cannot establish a significant probability of success on the merits, his litigation strategy caused substantial delays, and "the State and the victims of crime have an important interest in the timely enforcement of a sentence." *Hill*, 547 U.S. at 584. Further delay is unwarranted. This Court should deny the motion for stay of execution and deny the petition for a writ of certiorari.

Respectfully submitted,

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